

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE
LITIGATION

MDL No. 1456

Master File No. 01-CV-12257-PBS

Judge Patti B. Saris

**This Document Relates to
ALL ACTIONS.**

**MOTION TO SUBSTITUTE PROPER PARTY
BOEHRINGER INHELHEIM PHARMACEUTICALS, INC.
FOR BOEHRINGER INGELHEIM CORPORATION AND RESPONSE IN
OPPOSITION TO BOEHRINGER DEFENDANTS' MOTION TO DISMISS**

Plaintiffs respectfully request that this Court substitute Boehringer Ingelheim Pharmaceuticals, Inc. for defendant Boehringer Ingelheim Corporation, and deny the Boehringer Defendants' Motion To Dismiss. In support thereof, plaintiffs state as follows:

OVERVIEW

Boehringer Ingelheim Corporation (“BIC”), Ben Venue Laboratories, Inc. (“Ben Venue”) and Bedford Laboratories, Inc. (“Bedford”) (collectively, the “Boehringer Defendants”) have disingenuously filed a motion to dismiss with this Court, asserting that BIC did not manufacture the two drugs that one of the named plaintiffs purchased and, therefore, all three defendants should be dismissed. The *Boehringer Defendants* fail to advise this Court that the other *Boehringer* drugs listed in Appendix A to the December 5, 2003 Amended Master Consolidated Complaint (“AMCC”) were

manufactured by Bedford, which is a division of Ben Venue.¹ Moreover, the Boehringer Defendants fail to advise this Court that the two drugs for which a named plaintiff did pay were manufactured by Boehringer Ingelheim Pharmaceuticals Inc. (“Boehringer Pharmaceuticals”), which falls under the same corporate umbrella as the Boehringer Defendants. *See* Boehringer Annual Report. Accordingly, plaintiffs seek leave to substitute Boehringer Pharmaceuticals for its sister company BIC and relate the amendment back to the filing of the AMCC.

**I. BOEHRINGER PHARMACEUTICALS SHOULD BE SUBSTITUTED
FOR BIC AS THE PROPER PARTY**

Despite ample opportunity to previously advise the Court during briefing on the motions to dismiss that BIC is the wrong party, the Boehringer Defendants failed to do so. Instead, now for the first time, the Boehringer Defendants claim that BIC does not manufacture or distribute Atrovent. This is not a reason to dismiss the Boehringer Defendants *in toto* however. Tellingly missing from the Boehringer Defendants’ motion is the fact that Atrovent is actually manufactured by BIC’s sister company, Boehringer Pharmaceuticals.

Rule 21 of the Federal Rules of Civil Procedure provides in pertinent part:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Fed. R. Civ. P. 21. It is well settled in this District that “A party may resort to Rule 21 to add a party who for some innocent reason has not been made a party to the action and whose presence is necessary or desirable.” *Data Gen. Corp. v. Grumman Sys. Support*

¹ See <http://www.boehringer-ingelheim.com/corporate/home/download/annualreport2002.pdf> (“Boehringer Annual Report”).

Corp., 825 F. Supp. 340, 344 (D. Mass. 1993). The misjoinder of BIC, instead of Boehringer Pharmaceuticals, should thus not result in the dismissal of all claims against the Boehringer Defendants. Instead, Boehringer Pharmaceuticals should be substituted and joined as the proper party.

Moreover, Rule 15 of the Federal Rules of Civil Procedure provides that a plaintiff's inadvertent misnaming of a defendant may be corrected by an amendment that relates back to the original pleading, where:

the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

See Federal Rule of Civil Procedure 15(c)(3). Plaintiffs' naming of BIC as a defendant rather than Boehringer Pharmaceuticals is clearly an error within the scope of Rule 15(c).

First, the claims against Boehringer Pharmaceuticals and BIC inarguably arise out of the same conduct – the manipulation of the AWP for Atrovent and other drugs at issue in the complaint. Second, Boehringer Pharmaceuticals certainly received notice of this action during the requisite time period. The two companies are superficially indistinguishable; indeed, BIC's Annual Reports make no distinction between which sister companies and subsidiaries manufacture which drugs. *See* Boehringer Annual Report. Moreover, both companies maintain their offices at the same office in Ridgefield, Connecticut. *Id.* Boehringer Pharmaceuticals can hardly claim it is unaware of this massive litigation.

Finally, the Boehringer Defendants' failure to previously raise this issue with the Court belies the fact that they knew that, but for plaintiffs' error in naming BIC,

Boehringer Pharmaceuticals would have been named as a defendant in the first place. Accordingly, pursuant to Rules 15 and 21, Boehringer Pharmaceuticals should be substituted as the proper defendant in place of BIC and the amendment should relate back to the filing of the AMCC.

II. THE BOEHRINGER DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED

The Boehringer Defendants' motion to dismiss boils down to an attack on standing. Plaintiffs may establish standing by showing an injury "fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1984). In response to similar arguments by Boehringer and other defendants, this Court already established that plaintiffs have demonstrated standing in this case if they can show that one named plaintiff purchased one named drug from a defendant. *See* February 24, 2004 Order, at 20. Appendix B to the AMCC asserts that one of the plaintiffs paid for Boehringer drugs Atrovent and Viramune.²

As set forth above, the Boehringer Defendants' motion to dismiss asserts for the first time that the companies never produced Atrovent. *See* Defendants' Motion to Dismiss, at 4. This argument is exclusively based upon the affidavit of a corporate vice president, who stated that "BIC does not design, manufacture or distribute Atrovent or any other pharmaceutical products, nor has it ever done so." *See* Herman Tetzner Aff. at ¶ 3).

² This Court previously dismissed Viramune from the lawsuit. However, Viramune was apparently produced by a joint venture between Boehringer Ingelheim Pharmaceuticals, Inc. and Roxane Laboratories, Inc. *See* <http://www.fda.gov/medwatch/safety/2000/viramune.htm>.

But the Boehringer Defendants' affidavit only tells half the story; countless public information sources describe BIC's role in manufacturing Atrovent. Indeed, BIC's 2002 Annual Report states "Boehringer Ingelheim is a research-driven corporation dedicated to researching, developing, manufacturing and marketing pharmaceuticals that improve health and quality of life." *See* Annual Report. Indeed, the Annual Report's glossary of products manufactured by BIC includes Atrovent. *See id.*, at 69.

Regardless of the apparent way in which BIC has held out to the public that it (and not Boehringer Pharmaceuticals) manufactures Atrovent, plaintiffs have moved with this response to substitute Boehringer Pharmaceuticals, Inc. as the proper party and the manufacturer of Atrovent. If this Court allows the substitution, one of the currently-named plaintiffs has already alleged that it paid for Atrovent based on AWP. Accordingly, any pleading deficiency will have been corrected and defendants' arguments regarding standing mooted.³

WHEREFORE, plaintiffs respectfully seek leave to substitute Boehringer Ingelheim Pharmaceuticals, Inc. for its sister company Boehringer Ingelheim Corp. as a defendant and relate the amendment back to the filing of the AMCC, and request that this Court deny the Boehringer Defendants' Motion To Dismiss.

³ Contemporaneously herewith, the National Automatic Sprinkler Industry Welfare Fund also filed a Petition to Intervene, because it purchased Bedford's methotrexate. Accordingly, if this Court permits the intervention, the Boehringer Defendants' motion to dismiss should also be denied for this reason.

Date: April 27, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I, Thomas M. Sobol, an attorney, caused a true and correct copy of the foregoing Motion To Substitute Proper Party Boehringer Ingelheim Pharmaceuticals, Inc. For Boehringer Ingelheim Corporation and Response In Opposition To Boehringer Defendants' Motion To Dismiss to be served on all counsel of record electronically on April 27, 2004, pursuant to Section D of Case Management Order No. 2.

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